

Supreme Court, U.S.

FILED

FEB 20 1991

OFFICE OF THE CLERK

← (3) →
No. 90-1089

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DONALD BRYANT AND WIFE, JUNETT BRYANT,
INDIVIDUALLY AND AS NEXT FRIENDS OF
DAWN D. BRYANT AND KIRT BRYANT,
Petitioners

v.

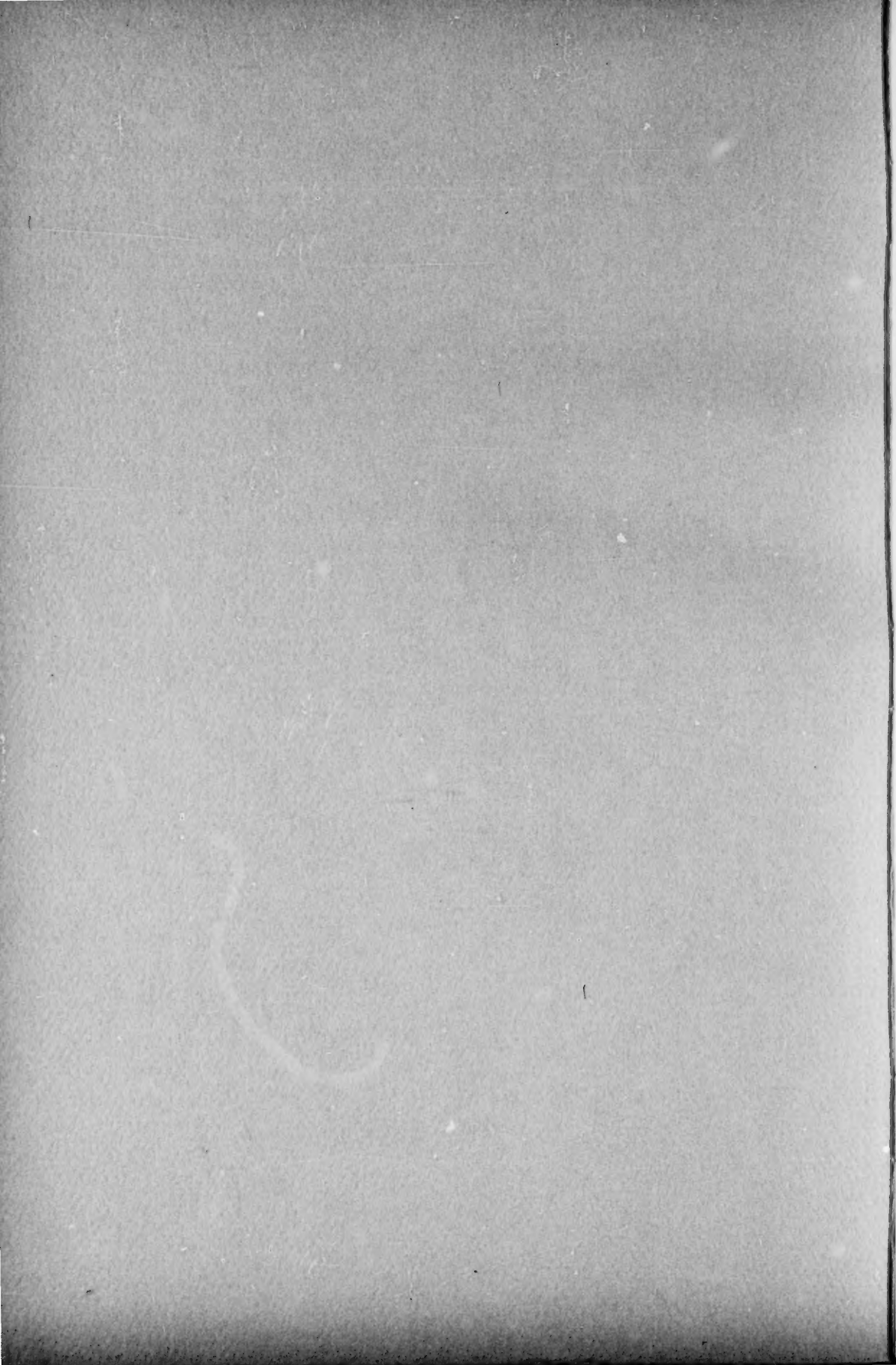
WINN-DIXIE STORES, INC.,
WINN-DIXIE HANDYMAN, INC.,
AND WINN-DIXIE, INC.,
Respondents

Petition for Writ of Certiorari
to the Court of Appeals of Texas,
Second Court of Appeals District,
Fort Worth, Texas

**Petitioners' Response to Respondents'
Brief in Opposition to Petition
for Writ of Certiorari**

ARTHUR JOHN BRENDER, JR.
LAW OFFICES OF ART
BRENDER
Burk Burnett Building
500 Main St., Suite 500
Fort Worth, Texas 76102
(817) 334-0171

Counsel for Petitioners



QUESTIONS PRESENTED

1. Does the holding of the Court of Appeals of Texas, Second Judicial District, Fort Worth, Texas, in *Bryant, et al. v. Winn-Dixie Stores, Inc., et al.*, that the Federal Firearms Control Act (the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968), 18 U.S.C. § 922(d), does not require a seller of ammunition to inquire about disqualifying grounds for the sale of ammunition under the statute conflict with the intent of Congress and with the interpretation of this statute by this Court in *Huddleston v. United States*, 415 U.S. 814, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974)?
2. Does the retail sale of ammunition require a licensed seller to inquire about the prior criminal record (or other disqualifying grounds) of the purchaser in order to comply with the Federal Firearms Control Act (the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968), 18 U.S.C. § 922(d), prohibition against the sale of ammunition to those who are disqualified by the statute?

LIST OF PARTIES

The parties to the proceeding below are the petitioners, Donald and Junett Bryant and their two children, Dawn D. Bryant and Kirt Bryant.

The respondents are Winn-Dixie Stores, Inc., Winn-Dixie Handyman, Inc., and Winn-Dixie, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
RESPONSE TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI	
RESPONSE TO "VI. OBJECTIONS TO JURISDICTION"	
"1. No Ground Under 28 U.S.C. § 1257(a)"	
"2. BRYANTS Seek an Advisory Opinion"	2
RESPONSE TO "VII. Statement of the Case" and "VIII. No Special or Important Reason for Granting Writ"	5
PRAYER.....	7

TABLE OF AUTHORITIES

<i>Cases:</i>	Page
<i>Bryant v. Winn-Dixie Stores, Inc.</i> , 786 S.W.2d 547 (Tex. App. – Fort Worth, 1990, writ denied)	2, 6
<i>Citizens and Southern National Bank v. Bougas</i> , 434 U.S. 35 (1977)	4
<i>Colovrat v. Oregon</i> , 366 U.S. 187 (1961)	4
<i>Diggles v. Horwitz</i> , 765 S.W.2d 839 (Tex. App. – Beaumont 1989 writ denied)	4
<i>Dun and Brad Street Inc. v. Greenmoss Builders, Inc.</i> , 472 U.S. 749 (1985)	4
<i>Huddleston v. United States</i> , 415 U.S. 814, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974)	i, 4, 6
<i>Hudson v. Louisiana</i> , 450 U.S. 40 (1981)	4
<i>Nixon v. Mr. Property Management</i> , 690 S.W.2d 546 (Tex. 1985)	3
<i>Pittsburgh v. Alcoa Parking Corporation</i> , 417 U.S. 369 (1974)	4
<i>Rodriquez v. Naylor Industries, Inc.</i> , 763 S.W.2d 411 (Tex. 1989)	6
<i>Saint Martin Lutheran Church v. South Dakota</i> , 451 U.S. 772 (1981)	4
<i>United States v. Oregon</i> , 366 U.S. 643 (1961)	4
<i>William E. Arnold Co. v. Carpenters District Counsel</i> , 417 U.S. 12 (1974)	4
<i>Statutes:</i>	
28 U.S.C. § 1257	4
Federal Firearms Control Act (Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968), 18 U.S.C. § 922(d)	i, 2, 5, 6
<i>Other:</i>	
Restatement 2d of Torts § 448	3

No. 90-1089

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DONALD BRYANT AND WIFE, JUNETT BRYANT,
INDIVIDUALLY AND AS NEXT FRIENDS OF
DAWN D. BRYANT AND KIRT BRYANT,
Petitioners

v.

WINN-DIXIE STORES, INC.,
WINN-DIXIE HANDYMAN, INC.,
AND WINN-DIXIE, INC.,
Respondents

Petition for Writ of Certiorari
to the Court of Appeals of Texas,
Second Court of Appeals District,
Fort Worth, Texas

**Petitioners' Response to Respondents'
Brief in Opposition to Petition
for Writ of Certiorari**

The Petitioners file this their response to the Respondents' Brief in Opposition to Petition for Writ of Certiorari and would show the Court that certain of the sections of Respondents' Brief deserve comment or explanation because the matters raised were new and not covered in the Petition for Certiorari. These sections

are noted by the titles given them in the Respondents' Brief.

"VI. OBJECTIONS TO JURISDICTION"

"1. No Ground Under 28 U.S.C. § 1257(a)"

"2. BRYANTS Seek an Advisory Opinion"

The Respondents claim in this section as well as in others, that the Court of Appeals in *Bryant v. Winn-Dixie Stores, Inc.*, 786 S.W.2d 547 (Tex. App. – Fort Worth, 1990, writ denied) upheld another ground of their Motion for Summary Judgment which would "necessitate the judgment in favor of Winn-Dixie still stand." (Brief in Opposition to Petition for Writ of Certiorari, p. 3). Nothing is further from the truth. As can be seen from the Court's opinion, attached as Appendix A to Petitioners' Writ of Certiorari, the Court of Appeals ruled only on the breach of duty question. (Petitioners' Petition for Certiorari Appendix A-15). Any reversal by the Court would remand the matter back to the Court of Appeals to determine the validity of that point. Thus, there is no advisory opinion being requested by the Petitioners since the Texas Court of Appeals, with writ denied by the Texas Supreme Court, clearly held, as the Petitioners' have claimed, that there is no duty to ask and inquire about nonqualifying factors under the Federal Firearms Control Act (the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968), 18 U.S.C. § 922(d). The decision of the Court of Appeals is final and because it was final on the points at issue here, there was no need to review other points. That does not mean that a reversal of the Court of Appeals decision would mean affirmance on any

other ground. The appeal placed in issue the entire judgment of the District Court and that judgment remains in abeyance until the appeal is decided. That would in no way affect this Court's jurisdiction to decide the federal issues raised by the Petition for Certiorari. For purposes of information, however, Texas courts, along with the majority of courts that have decided the issue have adopted Restatement 2d of Torts § 448 which states as follows:

The act of a third person in committing an intentional tort or crime is a superceding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

The Texas Supreme Court, in *Nixon v. Mr. Property Management*, 690 S.W.2d 546 (Tex. 1985), adopted § 448 of the Restatement 2d of Torts. It is clear now that a tortfeasor's negligence will not be excused where criminal conduct is a foreseeable result of such negligence and that rule is uniformly followed. Since this matter was decided on a motion for summary judgment, the entire facts of the action have not been brought forth even in the district court. The question of proximate cause is generally a question of fact to be determined by the fact finder. *Nixon v. Mr. Property Management*, *supra*. Furthermore, Winn-Dixie provided no summary judgment proof whatsoever on the issue of proximate cause in its

Motion for Summary Judgment and relied only on the legal argument that, as a matter of law, the criminal act was a superceding cause. This argument has been rejected by the Texas courts who require proof on behalf of a defendant on this point and thus, any remand of this matter to the Court of Appeals will undoubtedly result in the proximate cause point of error being reversed and remanded to the District Court. *Diggles v. Horwitz*, 765 S.W.2d 839 (Tex. App. – Beaumont 1989).

The Bryants seek review of this decision under 28 U.S.C. § 1257 based on the conflict between the decisions of the highest state court of the State of Texas and that of the Supreme Court on matters of federal law and in particular, the interpretation of the act at issue by this Court in *Huddleston v. United States*, 415 U.S. 814 (1974). See *Hudson v. Louisiana*, 450 U.S. 40 (1981), *William E. Arnold Co. v. Carpenters District Counsel*, 417 U.S. 12 (1974), *Pittsburgh v. Alcoa Parking Corporation*, 417 U.S. 369 (1974). Likewise, a conflict between decisions of the highest courts of two or more states on a federal question is also a valid ground for Supreme Court review particularly where the conflict occurs in connection with the construction of a federal statute. *Saint Martin Lutheran Church v. South Dakota*, 451 U.S. 772 (1981), *United States v. Oregon*, 366 U.S. 643 (1961), *Citizens and Southern National Bank v. Bougas*, 434 U.S. 35 (1977), *Dun and Brad Street Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). Despite the absence of a conflict, state court decisions involving the construction and application of federal statutes may be reviewed on certiorari where the question is sufficiently important. *Colovrat v. Oregon*, 366 U.S. 187 (1961). See Stern,

Gressman, and Shapiro, *Supreme Court Practice*, 6th ed. Given the proliferation of weapons, skyrocketing crime rates and the effect of weapons in the hands of those who are disqualified, the question raised by the Texas Court of Appeals decision is sufficiently important to merit Supreme Court review of this interpretation of the Federal Gun Control Statute, 18 U.S.C. § 922(d).

“VII. Statement of the Case”

**“VIII. No Special or Important Reason
for Granting Writ”**

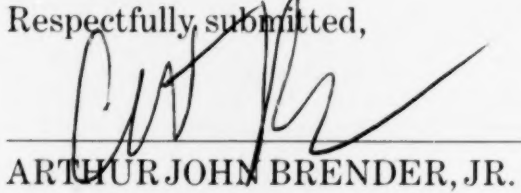
The Respondents' attempt in these sections to extend the “duty” to which they claim they complied to a ridiculous extent. The minimal duty which the Federal Firearms Control Act requires of the seller of a gun or ammunition is to inquire of the reasons that disqualify one from the purchase under the Act. In this case, the Court of Appeals held that there was no such inquiry necessary. The Respondents cite an affidavit of the seller of the ammunition, John Schwabauer, that conflicts diametrically with his testimony given in his deposition, portions of which are quoted in the Petition for Certiorari. Mr. Schwabauer gave his deposition on August 10, 1988, in the 17th District Court in Fort Worth, Tarrant County, Texas. After stating that he had no knowledge of any requirement save and except that the purchaser of ammunition had to be over eighteen years of age, his affidavit attached to the Respondents' Motion for Summary Judgment claims the contrary. Disregarding questions of the propriety of the glaring conflict between his deposition and his affidavit, under Texas summary judgment procedure, all inferences of conflicts in the evidence are

resolved in favor of the non-movant. *Rodriquez v. Naylor Industries, Inc.*, 763 S.W.2d 411 (Tex. 1989). The Court in Bryant so held. *Bryant v. Winn-Dixie*, 786 at 548. Other evidence in the record refutes the testimony Respondents cite about the ease with which information about criminal records can be obtained. This is not to argue that the Bryants are asking that there be a record check of everyone purchasing a gun or ammunition. The Bryants have maintained throughout that Mr. Schwabauer should have been informed of the requirements of 28 U.S.C. § 922(d) by his employer Winn-Dixie and should have asked the killer those questions. He then should have made a judgment based on the information he elicited as to whether or not he should have sold the ammunition. The Court of Appeals directly held that he was not required to do so, a contention the Petitioners believe is at odds with this Court's interpretation of the Federal Firearms Control Act (Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Gun Control Act of 1968), 18 U.S.C. § 922(d) and this Court's decision in *Huddleston v. United States*, *supra* and the other interpretations of that statute as rendered by various state courts and federal courts of appeal as set out in the Petition for Certiorari. It is that issue for which the Petitioners seek review.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that the Court grant their Petition for Certiorari.

Respectfully submitted,



ARTHUR JOHN BRENDER, JR.

LAW OFFICES OF ART
BRENDER

Burk Burnett Building
500 Main St., Suite 500
Fort Worth, Texas 76102
Facsimile: (817) 334-0274
Telephone: (817) 334-0171

Counsel for Petitioners

No. 90-1089

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DONALD BRYANT AND WIFE, JUNETT BRYANT,
INDIVIDUALLY AND AS NEXT FRIENDS OF
DAWN D. BRYANT AND KIRT BRYANT,
Petitioners

v.

WINN-DIXIE STORES, INC.,
WINN-DIXIE HANDYMAN, INC.,
AND WINN-DIXIE, INC.,
Respondents

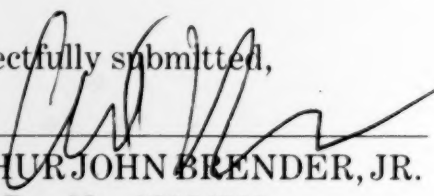
Certificate of Service

I hereby certify that on this the 19th day of February, 1991, one copy of the Petitioners' Response to Respondents' Brief in Opposition to Petition for Writ of Certiorari, was deposited in the United States mail, first class, postage prepaid, to the following:

Mr. Sloan B. Blair
Mr. Tolbert L. Greenwood
Ms. Mary Colchin Johndroe
Cantey & Hanger
801 Cherry Street, Suite 2100
Fort Worth, Texas 76102
(817) 877-2800

I further certify that all parties required to be served have been served.

Respectfully submitted,



ARTHUR JOHN BENDER, JR.

State Bar No. 02954500

LAW OFFICES OF ART
BENDER

Burk Burnett Building

500 Main St., Suite 500

Fort Worth, Texas 76102

Telephone: (817) 334-0171

Telecopier: (817) 334-0274

Counsel for Petitioners